

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**STATE OF OKLAHOMA, ex rel.
W. A. DREW EDMONDSON, in his capacity as
ATTORNEY GENERAL OF THE STATE OF
OKLAHOMA and OKLAHOMA SECRETARY
OF THE ENVIRONMENT C. MILES TOLBERT,
in his capacity as the TRUSTEE FOR NATURAL
RESOURCES FOR THE STATE OF OKLAHOMA,**

Plaintiff,

vs.

) 05-CV-0329 JOE-SAJ

**TYSON FOODS, INC., TYSON POULTRY, INC.,
TYSON CHICKEN, INC., COBB-VANTRESS, INC.,
AVIAGEN, INC., CAL-MAINE FOODS, INC.,
CAL-MAINE FARMS, INC., CARGILL, INC.,
CARGILL TURKEY PRODUCTION, LLC,
GEORGE'S, INC., GEORGE'S FARMS, INC.,
PETERSON FARMS, INC., SIMMONS FOODS, INC.,
and WILLOW BROOK FOODS, INC.,**

Defendants.

**TYSON FOODS, INC., TYSON POULTRY, INC.,
TYSON CHICKEN, INC., COBB-VANTRESS, INC.,
GEORGE'S, INC., GEORGE'S FARMS, INC.,
PETERSON FARMS, INC., SIMMONS FOODS, INC.,
and WILLOW BROOK FOODS, INC.,**

Third Party Plaintiffs,

vs.

City of Tahlequah, *et al.*,

Third Party Defendants

**THIRD PARTY PLAINTIFFS' OPPOSED
MOTION TO ENLARGE TIME IN WHICH
TO SERVE THIRD PARTY COMPLAINT**

In accordance with N.D. LCvR 7.1(g), Third Party Plaintiffs in the above-styled and numbered cause hereby move the Court for an Order enlarging the time to serve the Third Party Complaint upon Third Party Defendants. In support of their Motion, Third Party Plaintiffs state as follows:

1. Neither a trial date nor any other deadlines have been established in this action; and as such, the requested extensions will have no impact on the proceedings in this action.

2. Third Party Plaintiffs filed on December 23, 2005, their *Motion to Toll Running of Time to Serve Process Upon Third Party Defendants Pending Disposition of Defendants' Motion to Stay* [Docket No. 173]. On January 9, 2006, the Court granted Third Party Plaintiffs' Motion [Docket No. 190] tolling the time period for service "until such time as the Court rules upon the Defendants' Motion to Stay or otherwise enters an order setting a date for service of process upon the Third Party Defendants."

3. On February 22, 2006, Defendants filed their *Notice of Withdrawal of Defendants' Motion to Stay Proceedings and Request for Expedited Hearing* [Docket No. 212], whereby they withdrew their *Motion to Stay Proceedings and Integrated Brief in Support and Request for Expedited Hearing* [Docket No. 125].

4. Third Party Plaintiffs' filed their *Third Party Complaint* on October 4, 2005 [Docket No. 80], setting forth their claims against 256 individuals and entities. Based upon the allegations and theories advanced by the Plaintiffs in their First Amended Complaint, the Third Party Plaintiffs

assert that if they are liable to the Plaintiffs for any alleged natural resource injuries within the Illinois River Watershed (which they continue to deny), then the Third Party Defendants should be held similarly liable based upon their operations and conduct, which has the same effect or potential to affect the Illinois River Watershed as those alleged against the Defendants.

5. The original deadline for service of the Third Party Complaint pursuant to Fed. R. Civ. P. 4(m) was **February 1, 2006**. Under the Court's January 9, 2006 Order, this time period was tolled as of that date, which leaves approximately 23 days of the original 120-day time period under Fed. R. Civ. P. 4(m). Twenty-three (23) days is an insufficient amount of time to complete issuance and service upon the two hundred and fifty six (256) Third Party Defendants, as some are not amenable to service by mail.

6. This Court has the discretion under Fed. R. Civ. P. 4(m) and 6(b) to enter an extension of that time period. Third Party Plaintiffs request that the Court set a date for service for 60 days from the entry of an Order on this Motion. A service deadline sixty (60) days from the entry of this Order will only enlarge the original service deadline prior to its tolling by thirty-seven (37) days.

7. Third Party Plaintiffs have contacted counsel for Plaintiffs who have stated that they have no objection to the Third Party Plaintiffs' request so long as the Third Party Plaintiffs will agree that the extension will not prejudice the Plaintiffs' right to file Motions to Strike the Third Party Complaint or prejudice the Third Party Defendants' rights to be served within a prescribed period of time. Because Third Party Plaintiffs cannot agree to waive any of their defenses to either a Motion to Strike the Third Party Complaint by Plaintiffs or any motion by Third Party Defendants to dismiss the Third Party Complaint due to untimely service pursuant to Fed. R. Civ. P. 4(m),

Third Party Plaintiffs have rejected Plaintiffs' offer of conditional concurrence to this Motion; and thus, Third Party Plaintiffs state that Plaintiffs object to filing of this Motion.

ARGUMENTS AND AUTHORITIES

Third Party Plaintiffs' Motion to enlarge the deadline for service of process upon the Third Party Defendants is proposed as a reasonable case management tool and granting the requested relief will not materially delay the progress of the lawsuit. The instant Motion will serve the interests of justice as it will permit the Court to deal with the many issues that are currently pending between Plaintiffs and Defendants in this matter before being burdened with any responsive pleadings of the Third Party Defendants.

It is within the Court's discretion to enter an order extending or modifying the 120-day time limit for service under the Federal Rules. Fed. R. Civ. P. 6(b) and 4(m); *Espinoza v. United States*, 52 F.3d 838, 840-41 (10th Cir. 1995) (discussing the trial court's discretion and noting the abuse of this discretion standard of review); *Baden v. Craig-Hallum, Inc.*, 115 F.R.D. 582, 585 (D. Minn. 1987) (recognizing that a motion under Rule 6(b) is the proper mechanism for seeking relief from the 120-day time limit). Although relief from the time limit imposed by Rule 4(m) is generally premised on a movant's proof of "good cause," the 1993 amendments to the Rule broadened the trial court's discretion to permit extensions of the 120-day limit even when good cause is not shown. *Henderson v. United States*, 517 U.S. 654, 662 (1996) (citing the 1993 Advisory Committee's Notes on Fed. R. Civ. P. 4, 28 U.S.C.App., p. 654); *Espinoza*, 52 F.3d at 840-41 (same); *Hunsinger v. Gateway Management Associates*, 169 F.R.D. 152, 154 (D. Kansas 1996) (same). The *Espinoza* court held that within the Tenth Circuit, trial courts should make a preliminary evaluation of whether the movant has shown good cause for extending the time for

service. *Espinoza*, 52 F.3d at 841. If the showing is made, the movant is entitled to a mandatory extension of time. *Id.* Failing a showing of good cause, the court should nonetheless proceed to consider “whether a permissive extension of time is warranted.” *Id.*

Under the current procedural posture of this action, good cause exists to support the Third Parties Plaintiffs’ request for an enlargement of the time limit for service. The Court is justified in enlarging the time for service as a pure function of efficient case management. The additional delay of 60 days in bringing all of the parties within the jurisdiction of the Court to allow the litigation to proceed will be minimal, thus no prejudice to the Plaintiffs will accrue. Likewise, the Third Party Defendants would not be prejudiced by the delay in service, as it postpones their need to retain counsel and the onset of litigation expenses until such time as it is absolutely necessary. Moreover, due to the numbers of Third Party Defendants that must be served in this matter, it will take the Third Party Plaintiffs some time to coordinate service upon the Third Party Defendants.

The courts have recognized that motions to extend the service deadline offered prior to the expiration of the deadline are to be “liberally permitted.” *Baden v. Craig-Hallum, Inc.*, 115 F.R.D. 582, 585 (D. Minn. 1987). Accordingly, whether analyzed under the “good cause” standard or under the discretionary permissive standard, the Court’s decision to enlarge the time for service of process is prudent and justified.

CONCLUSION

Third Party Plaintiffs respectfully submit that it is in the interests of justice and the management of this action to enlarge the time limit for service of the Third Party Complaint upon the Third Party Defendants sixty (60) days from the date of the entry of an Order on this Motion, and therefore, they request that the Court enter its order granting the requested relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 24th day of February 2006, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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